The determination to change the date of the commission of the alleged offense was made *because of the notice of alibi* (R. 77), which the prosecution knew could be established beyond any dispute. The prosecution thus knew a full week before the trial that they were not going to rely on the date of February 20th as the date of the commission of the alleged offense. Yet such fact was completely withheld from petitioner and his counsel.

3. On January 29, 1945, the case was called for trial, and after denial of the supplemental motion for a continuance, the selection of a jury was commenced (R. 24). The special prosecutor, knowing then full well that he was going to change the date on which it was charged the alleged offense had been committed and thus render ineffectual petitioner's alibi, nevertheless requested the trial court to, and the trial court did, examine each of the prospective jurors concerning such alibi and the witnesses whom petitioner had stated he would rely upon to prove that on the date charged in the information he was in Grand Rapids and not in Lansing (R. 31-33; S. R. 63-64, 81-82, 119-120, 124-125, 137).

4. After the jury had been selected and sworn, the special prosecutor made his opening statement to the jury. Just prior to the conclusion thereof, he disclosed for the first time that the People did not intend to rely on the date of Thursday, February 20, 1941, but instead would prove the occurrence of the alleged offense on Tuesday, February 18, 1941 (R. 42-44).

5. Immediately upon such disclosure, petitioner, claiming surprise, moved to discharge the jury and for a "reasonable continuance" in order that he might prepare to meet the changed date, which motion the court denied (R. 45).

It is evident from the foregoing that the special prosecutor deliberately took an unfair advantage of petitioner, and that this was but another step in his calculated plan and design to deprive petitioner of a fair trial.

On page 44 of respondent's brief, reference is made to *People* v. *Kircher,* 333 Ill. 200, 164 N. E. 150. It should be noted that the trial court in that case granted the accused a continuance of two days to meet the change of the date charged in the indictment.

Respondent, in an attempt to show similarity of the instant case to the *Kircher* case, states (p. 45) that petitioner here "had at least two days, and possibly three (Jan. 29 to Feb. 1, * * *) after he learned of the change of date, to ascertain his whereabouts on the 18th day of February".

Respondent does not state to this court that the three days referred to, to wit, January 29th to February 1st, were the days on which petitioner was actually on trial.

Respondent does not state to this court that petitioner was then on trial at a place more than 100 miles from where he and his family resided, charged with an offense which had allegedly been committed approximately four years prior thereto.

Respondent ignores the fact that during the trial of a criminal case every available moment of an accused's time is usually spent with his counsel in preparing to meet day-to-day testimony adduced during the trial and that accused cannot be at more than one place at the same time.

Petitioner did not, nor does he now claim any vested right in an alibi. Petitioner does contend, however, that aside from legal rights, every concept of justice and fairness decrees, and due process requires, that where a change is made in the date of the commission of an alleged offense, especially under the circumstances here shown, a reasonable continuance to prepare to meet the changed date should have been granted to him.

The necessity for ascertaining petitioner's whereabouts on the changed date was not the only factor involved in such change in date. It may well have been that if petitioner had been given some reasonable continuance after the change in the date, he might have been able to establish that the alleged meeting of the Committee never took

place on February 18th as then claimed for the first time;* or that certain of the witnesses who testified thereto might not have been in the city of Lansing on February 18th; or that they did not attend the Committee meeting on that date.

By denying any continuance, petitioner was denied any opportunity of preparing to meet the changed date.

We respectfully submit that the circumstances here clearly establish that petitioner was not only *misled* but *deliberately misled,* and that the denial of his motion for a reasonable continuance to afford him an opportunity to meet the situation created by the change in the date, was a denial of due process.

III

Respondent contends (p. 45) that permitting the Circuit Judge who had issued the warrant to testify as a rebuttal witness for the People at the close of the case did not constitute a denial of due process.

In this connection, respondent concedes the law to be as set forth at pages 28-29 of petitioner's brief.

In an endeavor to meet petitioner's contention that the sole purpose of calling Judge Carr—as a so-called rebuttal witness and permitting him to give rebuttal testimony on collateral matters developed by the prosecution on cross-examination of Attorney General Rushton—was to prejudice petitioner before the jury, respondent contends (pp. 47-48) that the alleged rebuttal testimony of Judge Carr "was admissible in evidence to show the bias and interest of the former attorney general", and (pp. 49-50) that the Attorney General's testimony "related to relevant facts and not to collateral matters".

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* No documentary evidence of any kind was introduced by the People to establish that the Committee on State Affairs met on February 18th. The witnesses who had previously testified under oath that the meeting was held on February 20th relied entirely upon a reconstruction of the *probable* course of events as an explanation for their change to February 18th.

Respondent's contention in this respect is not supported by the record.

On cross-examination of Gail Handy, the People's only witness as to the alleged offer of a bribe, Handy admitted being interrogated by former Attorney General Rushton, at which time Mr. Rushton took a statement from him (R. 70). He was then asked whether a certain question which was read to him and his answer thereto which was read to him were made; he replied that he "wouldn't say I made that answer verbatim", but he admitted that he "made an answer, some kind of that nature" (R. 71-72).

Handy's answer made to the Attorney General was at variance with his testimony at the preliminary examination and at the trial.*

Because of Handy's failure to unqualifiedly admit that he made the precise answer set forth in his statement to the Attorney General, petitioner called Mr. Rushton, the former Attorney General, as a witness.

On direct examination Mr. Rushton testified that during the time he was Attorney General he had occasion to interview Handy; that at that hearing a stenographer, certain assistant attorney generals and himself were present. Thereupon, the identical question and answer thereto which had been read to Handy and respecting which Handy would not admit that he made such answer verbatim, were read to Rushton, and Rushton testified that at that time Handy was asked that question and had made that answer (R. 127-128).

The foregoing was the full extent of the direct examination of Mr. Rushton. Nothing else was asked of such witness by counsel for petitioner (R. 127-128).

Handy having admitted that he made a statement to the Attorney General and that he made an answer of "some kind of that nature," it follows that there was no issue

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* Under oath, he told the Attorney General and several of his assistants that the bribe offer was made shortly before 10 A. M. (R. 134), whereas on the trial he fixed the time as being after lunch (R. 56).

concerning Rushton's interest or bias as affecting his testimony given on direct examination.

On cross-examination of Mr. Rushton, the special prosecutor went into many new and collateral matters, none of which was touched upon in direct examination.

The special prosecutor was permitted, over objection, to ask the witness Rushton whether he told Judge Carr about the statement he had taken from Handy, and he testified that he had (R. 128). Certainly, whether or not Mr. Rushton—whose testimony on direct examination was specifically confined to whether or not Handy had been asked a certain question and had given a certain answer at a certain time—told Judge Carr that he had taken a statement from Handy was entirely immaterial and irrelevant to the issue of whether or not appellant had offered Handy a bribe.

After injecting such collateral and immaterial matter on cross-examination, the People called as a rebuttal witness Judge Carr, the person who at such time was acting as the one-man grand jury in Ingham County—who had issued the warrant for appellant's arrest upon the charge on which he was then being tried—who had conducted the preliminary examination and had bound petitioner over for trial in the Circuit Court—who had denied petitioner's motion for a continuance sought by reason of the widespread publicity attendant upon Senator Hooper's murder, accompanied by false and inflammatory statements issued by the said one-man grand jury and his special prosecutor.

Over objection, Judge Carr was permitted to tell the jury that Rushton's statement that he had told Judge Carr about the Gail Handy matter was untrue (R. 150-153).

The prejudice created by permitting such testimony, in violation of principles of law firmly established throughout these United States, was magnified by the fact that it was Judge Carr, the one-man grand jury, who was called as a so-called rebuttal witness, in fact, the very last witness before the case was submitted to the jury.

We respectfully submit that the foregoing procedure was but another deliberate and calculated step in the special prosecutor's plan to prejudice petitioner and to deprive him of a fair and impartial trial.

CONCLUSION

When the record herein is examined as a whole, the conclusion is inescapable that petitioner was deprived of a fair and impartial trial, and thus denied due process under the United States Constitution.

The writ of certiorari should be granted.

Respectfully submitted,

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